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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MUTHU SUKUMARAN,
12 Plaintiff,

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16 vs.
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U.S. DHS/ICE-EL CENTRO, *ET AL.*,

Defendants.

Civil No. 14-cv-00967 BAS(JMA)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA*
PAUPERIS [ECF No. 2];**

**(2) DENYING MOTION TO
APPOINT COUNSEL
[ECF No. 3];**

**(3) DISMISSING CIVIL ACTION
AS TO CERTAIN DEFENDANTS
FOR FAILING TO STATE A
CLAIM PURSUANT TO
28 U.S.C. § 1915(e)(2)(B)(ii);**

AND

**(4) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF
SUMMONS AND COMPLAINT
UPON REMAINING
DEFENDANTS PURSUANT
TO FED.R.CIV.P. 4(c)(3) AND
28 U.S.C. § 1915(d)**

1 Sukumaran Muthu (“Plaintiff”), an immigration detainee at the U.S. Department
 2 of Homeland Security’s (“DHS”) Immigration and Customs Enforcement’s (“ICE”) Processing Center in El Centro, California, and proceeding pro se, has filed a civil action
 3 pursuant to 42 U.S.C. §§ 1983 and 1985(3) (ECF No. 1 (“Compl.”)).

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 5 Plaintiff claims Defendants have violated his constitutional rights to adequate
 6 medical care and meaningful access to the courts, and have further “breach[ed] [a]
 7 suggested promissory agreement” to provide him with a “T-Visa” or protection under the
 8 “witness protection program” based on information he alleges to have provided
 9 regarding international trafficking and a “ring of smugglers.” *See* Compl. at pp. 4-15.
 10 Plaintiff demands a jury trial and seeks an injunction and general and punitive damages.
 11 *Id.* at pp. 14-15.

12 Plaintiff did not prepay the filing fees required to commence a civil action;
 13 instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.
 14 § 1915(a) (ECF No. 2), as well as a Motion to Appoint Counsel pursuant to 28 U.S.C.
 15 § 1915(e)(1) (ECF No. 3).

16 **I. MOTION TO PROCEED IFP**

17 All parties instituting any civil action, suit, or proceeding in a district court of the
 18 United States, except an application for writ of habeas corpus, must pay a filing fee of
 19 \$400.¹ *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to
 20 prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28
 21 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).

22 “Unlike other indigent litigants, prisoners proceeding *in forma pauperis* must pay
 23 the full amount of the filing fees in civil actions and appeals pursuant to the PLRA
 24 [Prison Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002)

26 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after
 27 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a),
 28 (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May
 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is
 granted leave to proceed IFP. *Id.*

(citing 28 U.S.C. § 1915(b)(1); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002)). Under the PLRA, a “prisoner” is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” 28 U.S.C. § 1915(h). However, “an alien detained by the INS pending deportation is not a ‘prisoner’ within the meaning of the PLRA,” because deportation proceedings are civil, rather than criminal in nature, and an alien detained pending deportation has not necessarily been “accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.” *Agyeman*, 296 F.3d at 886.

Plaintiff is a citizen of India who was taken into the custody of the DHS at ICE’s El Centro Processing Center on August 20, 2011, and he claims he is subject to removal “from U.S. soil.” *See* Compl. at pp. 2, 4-5, 11, 28. Therefore, because Plaintiff is not a “prisoner” as defined by 28 U.S.C. § 1915(h), the filing fee provisions of 28 U.S.C. § 1915(b) do not apply to him. *See Agyeman*, 296 F.3d 885-86 (finding that PLRA’s filing fee requirements “do not apply to an alien detainee who proceeds *in forma pauperis* . . . , so long as he does not also face criminal charges.”).

Accordingly, the Court has reviewed Plaintiff’s affidavit of assets and finds it is sufficient to show that he is unable to pay the fees or post securities required to maintain this action. Therefore, his Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is **GRANTED**.

II. MOTION TO APPOINT COUNSEL

Plaintiff also requests the appointment of counsel to assist him because he is indigent, in custody, has limited access to legal resources, and little knowledge of the law. *See* Pl.’s Mot. (ECF No. 3) at p. 2.

There is no constitutional right to counsel in a civil case. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25-27 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts have some limited discretion to “request” that an attorney represent an indigent civil litigant. *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101, 1103 (9th

1 Cir. 2004). This discretion may be exercised only under “exceptional circumstances.”
 2 *Id.*; see also *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of
 3 exceptional circumstances requires “an evaluation of the likelihood of the plaintiff’s
 4 success on the merits and an evaluation of the plaintiff’s ability to articulate his claims
 5 ‘in light of the complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103
 6 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

7 The Court **DENIES** Plaintiff’s Motion without prejudice because, as discussed
 8 below, it appears Plaintiff is capable of articulating the factual basis for his claims, and
 9 his likelihood of success on the merits is not at all yet clear. *See id.* Therefore, neither
 10 the interests of justice nor any exceptional circumstances warrant appointment of counsel
 11 at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at
 12 1017.

13 **III. SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

14 **A. Standard of Review**

15 A complaint filed by any person proceeding IFP is subject to *sua sponte* dismissal
 16 if it contains claims which are frivolous, malicious, or fail to state a claim upon which
 17 relief may be granted, or if it “seeks monetary relief from a defendant who is immune
 18 from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii); *Calhoun v. Stahl*, 254 F.3d 845,
 19 845 (9th Cir. 2001) (per curiam) (holding that “the provisions of 28 U.S.C.
 20 § 1915(e)(2)(B) are not limited to prisoners”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
 21 Cir. 2000) (en banc) (“[S]ection 1915(e) not only permits, but requires a district court to
 22 dismiss an in forma pauperis complaint that fails to state a claim.”).

23 All complaints must contain “a short and plain statement of the claim showing that
 24 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
 25 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
 26 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 27 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 28 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that

1 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
 2 at 679. The “mere possibility of misconduct” falls short of meeting this plausibility
 3 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

4 “When there are well-pleaded factual allegations, a court should assume their
 5 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 6 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 7 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 8 allegations of material fact and must construe those facts in the light most favorable to
 9 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 10 the language of § 1915(e)(2)(B)(ii) “parallels the language of Federal Rule of Civil
 11 Procedure 12(b)(6)”).

12 However, while the court has an “obligation...where the petitioner is *pro se*,
 13 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 14 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 15 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it “may not
 16 supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
 17 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

18 **B. Plaintiff’s Allegations**

19 Plaintiff’s Complaint contains three separate causes of action. First, he claims
 20 Defendants Auhl, Carreno, and Chan, all medical officials at ICE’s El Centro Processing
 21 Center, waited months to refer him to a specialist after he complained of “severe” right
 22 shoulder pain, and again delayed recommended physical therapy after he underwent
 23 surgery. Compl. at pp. 4-8. Plaintiff claims the post-surgical delay in physical therapy
 24 caused his shoulder to heal improperly and, as a result, he has “lost most of the function
 25 in [his] Right arm.” *Id.* at pp. 6-8. Plaintiff further alleges Auhl, Carreno, and Chan
 26 delayed therapy in order to “obviate expenses.” *Id.* at p. 7.

1 Second, Plaintiff claims Defendants Reyna, Valenzuela, Bribiesca, Ortega, and
 2 Moya, violated his right to “meaningful access-to-court” by providing an “inadequate
 3 law library” and enforcing “faulty polic[ies].” *Id.* at pp. 12-13.

4 Third, Plaintiff alleges Defendants Reyna, Valenzuela, and Moya “breached [a]
 5 suggestive promissory agreement” to provide him with a T-Visa as a “victim in the
 6 severe form of trafficking” or Witness Protection Program protection based on
 7 information he provided regarding a “ring of smugglers . . . connected to an existing law
 8 firm operating in the State of California.” *Id.* at pp. 8-12.

9 **C. 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3)**

10 First, to the extent Plaintiff invokes federal jurisdiction in this matter pursuant to
 11 42 U.S.C. §§ 1983/1985(3), (Compl. at Cover Page & p. 1), he fails to state any claims
 12 upon which relief can be granted. The Civil Rights Act, codified at 42 U.S.C. § 1983,
 13 “provides a remedy only for deprivation of constitutional rights by a person acting under
 14 color of law of any state or territory or the District of Columbia.” *Daly-Murphy v.*
 15 *Winston*, 837 F.2d 348, 355 (9th Cir. 1988). Thus, because Plaintiff alleges
 16 constitutional violations by federal, not state actors, “the only possible action is an action
 17 under the authority of *Bivens* [*v. Six Unknown Named Agents of the Federal Bureau of*
 18 *Narcotics*, 403 U.S. 388 (1971)].” *Id.*; see also *Morse v. N. Coast Opportunities, Inc.*,
 19 118 F.3d 1338, 1343 (9th Cir. 1997) (“[B]y its very terms, § 1983 precludes liability in
 20 federal government actors.”).

21 And while the Ninth Circuit has held that, unlike section 1983, section 1985 “does
 22 not require action under the color of state law,” *Gillespie v. Civiletti*, 629 F.2d 637, 641
 23 (9th Cir. 1980) (noting that “[s]ection 1985,...is derived from the thirteenth amendment
 24 and covers all deprivations of equal protection of the laws and equal privileges and
 25 immunities under the laws, regardless of its source”), Plaintiff has nevertheless also
 26 failed to state a claim pursuant to 42 U.S.C. § 1985(3). Under § 1985(3), also known as
 27 the “Ku Klux Klan Act,” “a complaint must allege (1) a conspiracy, (2) to deprive any
 28 person or a class of persons of the equal protection of the laws, or of equal privileges and

1 immunities under the laws, (3) an act by one of the conspirators in furtherance of the
 2 conspiracy, and (4) a personal injury, property damage or a deprivation of any right or
 3 privilege of a citizen of the United States.” *Id.* Here, Plaintiff’s Complaint contains no
 4 facts to plausibly suggest the existence of any “meeting of the minds” between the
 5 named defendants to violate his rights. Nor does Plaintiff allege he was denied any
 6 constitutional right motivated by a “racial, or perhaps otherwise class-based, invidiously
 7 discriminatory animus.” *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th
 8 Cir. 2002). Therefore, Plaintiff has also failed to state a claim upon which § 1985(3)
 9 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Calhoun*, 254 F.3d at 845.

10 **D. *Bivens***

11 Second, because Plaintiff is proceeding without counsel, and his Complaint alleges
 12 violation of the Constitution by federal actors, the Court will liberally construe his case
 13 to arise under *Bivens*, 403 U.S. at 388. *Bivens* actions are judicially created equivalents
 14 to § 1983 actions allowing a plaintiff to sue a federal officer for civil rights violations
 15 under color of federal law. *See, e.g., Carlson v. Green*, 446 U.S. 14, 18 (1980) (allowing
 16 *Bivens* action for Eighth Amendment violations); *Hartman v. Moore*, 547 U.S. 250, 254,
 17 255 n.2 (2006) (describing a suit brought under *Bivens* as the “federal analog” to
 18 § 1983); *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (noting § 1983 and
 19 *Bivens* actions are the same except for the replacement of state actor under § 1983 with
 20 a federal actor under *Bivens*).

21 **E. Defendants U.S. DHS/ICE El Centro & Garzon**

22 To the extent Plaintiff’s Complaint seeks to hold the U.S. DHS/ICE liable for
 23 alleged civil rights violations occurring at the El Centro Processing Center where he is
 24 detained, however, he cannot state a *Bivens* claim. *Bivens* provides that “federal courts
 25 have the inherent authority to award damages against federal officials to compensate
 26 plaintiffs for violations of their constitutional rights.” *Western Center for Journalism*
 27 *v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000); *Butz v. Economou*, 438 U.S. 478,
 28 486 (1978). A *Bivens* action may only be brought against the responsible federal official

1 in his or her individual capacity, *see Daly-Murphy*, 837 F.2d at 355, and cannot stand
 2 against a federal agency like U.S. DHS/ICE, *see FDIC v. Meyer*, 510 U.S. 471 (1994),
 3 because “the purpose of *Bivens* is to deter *the officer*,” not the agency. *Id.* at 485
 4 (emphasis in original). Indeed, the Supreme Court has held that “[a]n extension of
 5 *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens*
 6 itself.” *Id.* at 486.

7 Moreover, because Plaintiff seeks damages under *Bivens* against John A. Garzon,
 8 an “ICE Field Officer Director” based only on claims that “[h]e’s the one who [makes]
 9 ultimate findings” and has “approval” over the other defendants, *see* Compl. at p. 2, he
 10 also fails to allege any plausible claim for relief. *See Iqbal*, 556 U.S. at 678. This is
 11 primarily because “vicarious liability is inapplicable to *Bivens*... suits,” *id.* at 676, and
 12 secondarily because Plaintiff has failed to allege any additional factual content to show
 13 that Garzon “through [his] own individual actions,...violated the Constitution.” *Id.*; *see*
 14 *also OSU Student Alliance v. Ray*, 699 F.3d 1053, 1073 n.15 (9th Cir. 2012) (“*Iqbal*
 15 holds simply that a supervisor’s liability, like any government official’s liability, depends
 16 first on whether he or she breached the duty imposed by the relevant constitutional
 17 provision.”).

18 **F. Access to Courts**

19 To the extent Plaintiff alleges that Defendants Reyna, Valenzuela, Bribiesca,
 20 Ortega, and Moya’s “inadequate law library and faulty polic[ies],” including one that
 21 limits a detainee’s possession of “legal materials” to no more than “four (4) inches high,”
 22 “create barriers to meaningful access-to-court,” *see* Compl. at p. 12, he also fails to state
 23 a plausible claim for relief. *Iqbal*, 556 U.S. at 678.

24 Prisoners “have a constitutional right to petition the government for redress of
 25 their grievances, which includes a reasonable right of access to the courts.” *O’Keefe v.*
 26 *Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); *Simmons v. Sacramento County Superior*
 27 *Court*, 318 F.3d 1156, 1160 (9th Cir. 2003) (applying *Bounds* and *Lewis* to pretrial
 28 detainee’s access to courts claims).

1 The Ninth Circuit has “traditionally differentiated between two types of access to
2 court claims: those involving prisoners’ right to affirmative assistance and those
3 involving prisoners’ rights to litigate without active interference.” *Silva v. Di Vittorio*,
4 658 F.3d 1090, 1102 (9th Cir. 2011). With respect to the right of assistance, the
5 Supreme Court has held that “the fundamental constitutional right of access to the courts
6 requires prison authorities to assist inmates in the preparation and filing of meaningful
7 legal papers by providing prisoners with adequate law libraries or adequate assistance
8 from persons trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). The right
9 to litigation assistance, however, is limited to the tools prisoners need in order to pursue
10 non-frivolous legal attacks on “their sentences, [either] directly or collaterally,” or “to
11 challenge the conditions of their confinement.” *Lewis v. Casey*, 518 U.S. 343, 353-55
12 (1996); *Silva*, 658 F.3d at 1102. To establish a violation, Plaintiff must allege facts
13 sufficient to show that the shortcomings in the prison’s library or legal assistance
14 program resulted in actual injury and hindered his efforts to pursue a non-frivolous legal
15 claim challenging his sentence or conditions of confinement. *Lewis*, 518 U.S. at 351-55.
16 An “actual injury” is defined as “actual prejudice with respect to contemplated or
17 existing litigation, such as the inability to meet a filing deadline or to present a claim.”
18 *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*,
19 886 F.2d 1166, 1171 (9th Cir. 1989) (“An ‘actual injury’ consists of some specific
20 instance in which an inmate was actually denied access to the courts.”) (quotations and
21 citations omitted); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

22 With respect to the right to litigate without active interference, “the Supreme Court
23 has held that the First Amendment right to petition the government includes the right to
24 file other civil actions in court that have a reasonable basis in law or fact.” *Silva*, 658
25 F.3d at 1102 (citations and quotations omitted). “This right does not require prison
26 officials to provide affirmative assistance in the preparation of legal papers, but rather
27 forbids states from erecting barriers that impede the right of access of incarcerated
28 persons.” *Id.* (citations and quotations omitted).

1 Here, Plaintiff fails to identify any specific act or policy attributable to Defendants
2 Reyna, Valenzuela, Bribiesca, Ortega, or Moya that precluded his pursuit of a non-
3 frivolous direct or collateral attack upon either a criminal conviction or sentence or the
4 conditions of his current confinement, or actively interfered with his right to litigate. *See*
5 *Lewis*, 518 U.S. at 355 (right to access to the courts protects only an inmate's need and
6 ability to "attack [his] sentence[], directly or collaterally, and...to challenge the
7 conditions of [his] confinement"); *Silva*, 658 F.3d at 1102. Therefore, he has not alleged
8 the "actual injury" required to support an access to courts violation. *See id.* at 353 n.4
9 (noting that the actual injury requirement applies even in cases "involving substantial
10 systematic deprivation of access to court," including the "total denial of access to a
11 library," or "an absolute deprivation of access to all legal materials"). In addition,
12 Plaintiff must also, but has failed to, describe the non-frivolous nature of any "underlying
13 cause of action, whether anticipated or lost." *Christopher v. Harbury*, 536 U.S. 403, 415
14 (2002).

15 In short, because Plaintiff has failed to allege that "a complaint he prepared was
16 dismissed," or that he was "so stymied" by Defendants' actions that "he was unable to
17 even file a complaint," direct appeal, or a petition for writ of habeas corpus that was not
18 "frivolous," his access to courts claim fails. *Lewis*, 518 U.S. at 351; *Christopher*, 536
19 U.S. at 416 ("[L]ike any other element of an access claim[,],... the predicate claim [must]
20 be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable'
21 nature of the underlying claim is more than hope.").

22 Moreover, Plaintiff's complaints related to the general deficiencies of the El
23 Centro Detention Center's law library, *e.g.*, its "old" computers, lapsed Lexis Nexis
24 subscription, and copy machines that "skip[] some pages" and chop off page numbers,
25 *see* Compl. at pp. 12-13, without some actual injury alleged to have resulted from them,
26 also fail to state a plausible access to courts claim. *Iqbal*, 556 U.S. at 678. Law libraries
27 and legal assistance programs are only the means of ensuring access to the courts; they
28 "are not ends in themselves." *Lewis*, 518 U.S. at 351. Because there is no "abstract,

freestanding right to a law library or legal assistance, [Plaintiff] cannot establish relevant actual injury simply by [alleging] that his...law library or legal assistance program is subpar in some theoretical sense.” *Id.*; *Blaisdell v. Frappiea*, 729 F.3d 1237, 1244 (9th Cir. 2013) (“[Access-to-courts rights] are tethered to principles of Article III standing.”).

G. “Breach of Suggestive Promissory Agreement” Claims

Plaintiff also claims Defendants Reyna, Valenzuela, and Moya “concurred” that he would be granted a T-Visa or witness protection based on information he furnished “about a ring of smugglers or unlawful enterprise.” *See* Compl. at pp. 8-9. Plaintiff claims these Defendants “breached” this “promissory agreement,” and “together elected to defraud [him] instead.” *Id.* at pp. 9-11. Plaintiff alleges this behavior amounts to an “intentional infliction of emotional distress.” *Id.* at p. 10.

To the extent Plaintiff seeks monetary damages against Defendants Reyna, Valenzuela, and Moya for acts alleged to have been taken in their individual capacities, and the Court has liberally construed those claims to arise under *Bivens*, his allegations of a breach of a promissory agreement or the infliction of emotional distress fail to state a plausible claim upon which *Bivens* relief can be granted. *Iqbal*, 556 U.S. at 678.² In *Bivens*, the Supreme Court recognized the availability of a federal cause of action against individual government officers for *constitutional* deprivations, not ordinary common law tort claims. *Bivens*, 403 U.S. at 397; *see also Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987) (holding that *Bivens* claim failed because Plaintiff alleged only state-law tort claims, not constitutional tort claims).

In addition, to the extent Plaintiff seeks to compel Defendants Reyna, Valenzuela, and Moya to grant him a T-Visa or somehow clear his participation in the “Witness Protection Program,” a *Bivens* suit does not authorize such relief. *See Lee v. Holder*, 599 F.3d 973, 975-76 (9th Cir. 2010) (finding that USCIS has “sole jurisdiction” over

² To the extent these claims might be liberally construed to arise under the Federal Tort Claims Act (“FTCA”), as opposed to *Bivens*, they still fail to state a claim because the United States is the only proper party defendant in an FTCA action. *See Kennedy v. U.S. Postal Service*, 145 F.3d 1077, 1078 (9th Cir. 1998).

1 Plaintiff's claims of eligibility for a U-Visa pursuant to 8 C.F.R. § 214.14(c)(1));
2 *Aguirre-Palacios v. Doe No. 1*, 2014 WL 584265, at *5 (S. D. Cal. Feb. 11, 2014)
3 (finding that the "Court's general federal question jurisdiction pursuant to *Bivens* does
4 not extend so far as to confer further jurisdiction over questions of Plaintiff's eligibility
5 for a U-Visa under 8 U.S.C. § 1101(a) (15)(U)"); *see also* 8 U.S.C.
6 § 1101(a)(15)(T)(i)(I) (providing for the issuance of a T-Visa in cases where "the
7 Secretary of Homeland Security, or...the Secretary of Homeland Security, in consultation
8 with the Attorney General, [has] determine[d]...that [an alien] (I) is or has been a victim
9 of a severe form of trafficking in persons."); 8 C.F.R. § 214.11(b) (governing
10 requirements for USCIS to qualify an alien for a T-Visa under the Victims of Trafficking
11 and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000)); *see*
12 *also United States v. Dann*, 652 F.3d 1160, 1163 n.2 (9th Cir. 2011) ("For a T-Visa to
13 be issued...[DHS] agents or prosecutors have to submit a letter to Immigration Services
14 certifying that the visa applicant has been the victim of a 'severe form of trafficking in
15 persons,' and the visa applicant must also cooperate in the prosecution of the
16 trafficker."); 18 U.S.C. § 3521(a)(1) (providing that "[t]he Attorney General may provide
17 for the relocation and other protection of a witness or a potential witness for the Federal
18 Government or for a State government in an official proceeding concerning an organized
19 criminal activity or other serious offense"); *Garcia v. United States*, 666 F.2d 960, 962-
20 64 (5th Cir. 1982) (finding the Witness Protection Program statutory scheme does not
21 create a protected property interest but rather authorizes the Attorney General to
22 determine, in his discretion, when, to whom, and for how long to provide protective
23 facilities); *Mirmehdi v. U.S.* 689 F.3d 975, 982 (9th Cir. 2011) (determining the
24 availability of a *Bivens* remedy requires a court to determine whether there is any
25 alternative, existing process for protecting the plaintiff's interest; if there is, the inquiry
26 stops and there is no *Bivens* remedy).

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28 ///

1 **H. Inadequate Medical Care Claims**

2 Finally, to the extent Plaintiff claims Defendants Auhl, Carreno, and Chan acted
3 with “deliberate indifference” to his “severe” shoulder pain by delaying his referral to
4 a specialist and access to physical therapy recommended by his surgeon, in order to
5 “obviate expenses” in violation of the Eighth Amendment, *see Compl.* at pp. 4-8, the
6 Court finds these allegations do contain “sufficient factual matter, accepted as true, to
7 state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quotations
8 omitted).

9 Because Plaintiff is an immigration detainee, his medical care claims against the
10 El Centro Processing Center’s medical personnel, strictly speaking, are rooted in the
11 Fifth Amendment’s Due Process clause, not the Eighth Amendment’s prohibition on
12 cruel and unusual punishment. *See Bell v. Wolfish*, 441 U.S. 520, 535-37 & n.16 (1979).
13 However, “[w]ith regard to medical needs, the due process clause imposes, at a
14 minimum, the same duty the Eighth Amendment imposes: persons in custody ha[ve] the
15 established right to not have officials remain deliberately indifferent to their serious
16 medical needs.” *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)
17 (citations and quotations omitted). Under the Eighth Amendment, prison officials are
18 considered “deliberately indifferent” if they “know[] of and disregard[] an excessive risk
19 to inmate health and safety.” *Colwell v. Bannister*, __ F.3d __, 2014 WL 3953769, at *3
20 (9th Cir. Aug. 14, 2014) (citing *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004)
21 (quotation omitted)). “Deliberate indifference ‘may appear when prison officials deny,
22 delay or intentionally interfere with medical treatment, or it may be shown by the way
23 in which prison physicians provide medical care.’” *Id.* (quoting *Hutchinson v. United*
24 *States*, 838 F.2d 390, 394 (9th Cir. 1988)).

25 Therefore, while the Court has found Plaintiff’s Complaint fails to state a claim
26 as to any other named Defendant, it will order U.S. Marshal service upon Defendants
27 Auhl, Carreno, and Chan on Plaintiff’s behalf. *See Lopez*, 203 F.3d at 1126-27; 28
28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and

perform all duties in [IFP] cases.”); Fed. R. Civ. P. 4(c)(3) (providing that “service be effected by a United States marshal, deputy United States marshal, or other officer specially appointed by the court . . . when the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.”).

IV. CONCLUSION & ORDER

Good cause appearing, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is **GRANTED**.

2. Plaintiff’s Motion to Appoint Counsel (ECF No. 3) is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that:

3. All claims alleged against Defendants U.S. DHS/ICE EL CENTRO, GARZON, REYNA, VALENZUELA, BRIBIESCA, MOYA, and ORTEGA are **DISMISSED WITHOUT PREJUDICE** for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

4. The Clerk is **DIRECTED** to issue a summons as to Plaintiff’s Complaint (ECF No. 1) upon the remaining Defendants, AUHL, CHAN, and CARRENO, and will forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each of these Defendants.³ In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and a certified copy of his Complaint and summons so that he may serve each Defendant. Upon receipt of this “IFP Package,” Plaintiff is directed to complete the Form 285s as completely and accurately as possible, and to return them to the United States Marshal according to the instructions provided by the Clerk in the letter

³ Because Plaintiff is suing an officer or employee of the United States and/or one of its agencies, he must also serve the United States. *See* Fed. R. Civ. P. 4(i)(1), (3). The Clerk is hereby directed to include in Plaintiff’s IFP package two separate copies of this Order, summons, Plaintiff’s Complaint, and additional blank USM Form 285s for Plaintiff’s use in serving the United States via the United States Attorney for the Southern District of California and the Attorney General of the United States in Washington, D.C. *See* Fed. R. Civ. P. 4(i)(1)(A)(i), (B).


1 accompanying his IFP package. The U.S. Marshal is thereafter directed to serve a copy
 2 of the Complaint and summons upon Defendants as directed by Plaintiff on the USM
 3 Form 285s. All costs of service will be advanced by the United States. *See* 28 U.S.C.
 4 § 1915(d); Fed. R. Civ. P. 4(c)(3).

5 5. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint
 6 within the time provided by the applicable provisions of Federal Rule of Civil Procedure
 7 12(a).⁴ *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted
 8 to "waive the right to reply to any action brought by a prisoner confined in any jail,
 9 prison, or other correctional facility under section 1983," once the Court has conducted
 10 its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2), and thus, has made a
 11 preliminary determination based on the face on the pleading alone that Plaintiff has a
 12 "reasonable opportunity to prevail on the merits," the defendant is required to respond).

13 6. Plaintiff must serve upon the Defendants or, if appearance has been entered
 14 by counsel, upon Defendants' counsel, a copy of every further pleading or other
 15 document submitted for consideration of the Court. Plaintiff must also include with the
 16 original paper to be filed with the Clerk of the Court a certificate stating the manner in
 17 which a true and correct copy of any document filed was also served on Defendants, or
 18 counsel for Defendants, and the date of such service. Any paper received by the Court
 19 which has not been filed with the Clerk or which fails to include a Certificate of Service
 20 will be disregarded.

21 **IT IS SO ORDERED.**

22
 23 **DATED: August 29, 2014**

24 
 25 **Hon. Cynthia Bashant**
United States District Judge

26 _____
 27 ⁴ Plaintiff is cautioned that "the sua sponte screening and dismissal procedure is
 28 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a]
 defendant may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
 Cal. 2007).